Tan Bun Teet & Ors v Menteri Sains, Teknologi dan Inovasi Malaysia & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-01(IM)(NCVC)-490–11 OF 2012
RAMLY ALI, AZAHAR MOHAMED AND AZIAH ALI JJCA
18 MARCH 2013

Civil Procedure — Injunction — Application for — Interim injunctive relief — Application for stay of decision granting fourth respondent temporary operating license (TOL) until final disposal of pending judicial review proceedings — High Court dismissed application — Appeal — Whether High Court judge erred in dismissing application — Whether stay was unsustainable as TOL had since been issued to fourth respondent — Whether appellants had locus standi — Whether appellants' failure to include third and fourth respondents from very outset was fatal to their applications

Civil Procedure — Injunction — Interlocutory injunction — Whether such injunction could be granted against public authority or government — Government Proceedings Act 1956 s 29 — Specific Relief Act 1950 s 54

Lynas Malaysia Sdn Bhd ('the fourth respondent'), a fully owned subsidiary of Lynas Corporation Ltd ('the third respondent'), a company incorporated in Australia, had applied for a mining licence to produce 'rare earth oxides and carbonates' in the Gebeng Industrial Area ('the GIA'). The Atomic Energy Licensing Board ('the second respondent'), which is empowered under the Atomic Energy Licensing Act 1984 ('the Act') to set the safety level to be complied with under any activities that use radioactive materials, had granted the fourth respondent a temporary operating licence ('TOL') for its operations in the GIA. The appellants, who were residents and/or registered proprietors of landed properties in the district of Kuantan and Gebeng, Pahang, and three others filed a notice of appeal pursuant to s 32 of the Act to the Minister of Science, Technology and Innovation ('the first respondent') against the decision of the second respondent to grant the fourth respondent the TOL. Subsequently, the appellants withdrew from proceeding with the appeal, thereby leaving the three others to pursue the appeal. However, when the first respondent dismissed the appeal, the appellants filed judicial review proceedings seeking, inter alia, an order of certiorari to quash the decision of the first respondent, an order of prohibition prohibiting the first respondent from issuing any TOL or permanent licence to the fourth respondent until and unless certain conditions were met and a stay of the TOL pending determination of these proceedings. The appellants then filed an application

for an interim stay until the final disposal of the pending judicial review proceedings. By way of this application the appellants sought to restrain the issuance of the TOL and the exercise of the rights under the TOL, which had been given to the fourth respondent. The High Court judge found that since the TOL had been issued to the fourth respondent, the first and second respondents were no longer involved and that hence it was impossible to stay the decisions of the first and second respondents. In addition, the High Court judge also found that s 29 of the Government Proceedings Act 1956 ('the GPA') and s 54 of the Specific Relief Act 1950 ('the SRA') would preclude any injunctive order being granted against the first and second respondents. The High Court thus dismissed the appellants' application for interim injunctive relief. The appellants now appealed against that decision.

Held, dismissing the appeal with costs:

(1) The decision to refuse the application for an injunction/stay was an exercise of discretion on the part of the trial court, which the appellate court would be slow to interfere with. In the present case, the application to stay the decisions of the two respondents approving the TOL was unsustainable as the TOL had since been issued to the fourth respondent for its project in the GIA. It was an undisputed fact that the fourth respondent was now the legal and valid holder of the TOL and it was not possible or practical for the decision to be stayed. Further, the appellants by withdrawing from proceeding with the appeal against the decision of the second respondent to grant the fourth respondent the TOL, had no locus standi to now apply for an injunction or stay against the first and second respondents (see para 10).

(2) On the factual matrix of the present case, the third and fourth respondents should have been made parties to proceedings at the very outset ie before an injunction was sought. However, the third and fourth respondents were not named or made parties to the judicial review proceedings or the stay application. Instead the third and fourth respondents had to file an application to intervene to be added as parties. As the outcome of granting the stay would detrimentally affect the operations of the fourth respondent, the failure on the part of the appellants to include the third and fourth respondents from the very outset was fatal to their applications (see para 11).

(3) The balance of equity had to be weighed not only as between the appellants and the first and second respondents, but also as regards to the rights and interests of the third and fourth respondents, who had invested large sums of money for their operations in the GIA. It is trite law that an applicant for interlocutory injunction should provide valuable undertaking to pay damages as well as the means to fulfill such an

undertaking. However, the appellants as private individuals had not shown proof of their financial standing to make good their bare undertaking (see para 11).

(4) In any case, it is settled law that an injunction, interlocutory or permanent, could not be granted against the government under s 29 of the GPA and s 54 of the SPA. If the relief sought was granted, it would interfere with the public duty of the second respondent under the Act and as such, s 29 of the GPA protected the second respondent, a public authority, from any form of injunctive orders (see paras 14 & 16).

(5) In the circumstances, the decision of the High Court judge to dismiss the appellants' application was correct in law and in fact. The appellants had failed to show any grounds warranting appellate interference. The first and second respondents were awarded costs in the sum of RM10,000 and the third and fourth respondents were also awarded the same amount as costs (see paras 17–18).

[Bahasa Malaysia summary

Lynas Malaysia Sdn Bhd ('defendan keempat'), syarikat subsidiari milikan penuh Lynas Corporation Ltd ('responden ketiga'), sebuah syarikat yang ditubuhkan di Australia, telah memohon lesen menggali untuk menghasilkan 'rare earth oxides and carbonates' di Gebeng Industrial Area ('GIA'). Lembaga Perlesenan Tenaga Atom ('responden kedua'), yang mana diberi kuasa di bawah Akta Perlesenan Tenaga Atom 1984 ('Akta') untuk menetapkan tahap keselamatan yang harus dipatuhi bagi mana-mana aktiviti yang menggunakan material-material radioaktif, telah memberikan lesen operasi sementara ('LOS') untuk operasi di GIA. Perayu-perayu, yang mana merupakan pemastautin dan/atau pemilik-pemilik berdaftar hartanah di daerah Kuantan dan Gebeng, Pahang, dan tiga yang lain telah memfailkan notis rayuan mengikut s 32 Akta kepada Menteri Sains, Teknologi dan Inovasi ('responden pertama') terhadap keputusan responden kedua untuk memberikan LOS kepada responden keempat. Selanjutnya, perayu-perayu menarik diri daripada meneruskan rayuan, yang mana meninggalkan tiga yang lain untuk meneruskan rayuan. Walau bagaimanapun, apabila responden pertama menolak rayuan, perayu-perayu telah memfailkan prosiding-prosiding semakan kehakiman untuk mendapatkan, antara lain, perintah certiorari untuk membatalkan keputusan responden pertama, perintah halangan untuk menghalang responden pertama daripada mengeluarkan LOS atau lesen tetap kepada responden keempat sehingga dan melainkan syarat-syarat tertentu dipatuhi dan penangguhan LOS sementara penentuan prosiding-prosiding tersebut. Perayu-perayu kemudian memfailkan permohonan penangguhan interim sehingga pelupusan muktamad prosiding-prosiding semakan kehakiman yang tertangguh. Melalui permohonan ini perayu-perayu memohon untuk menghalang pengeluaran LOS dan pelaksanaan hak-hak di bawah LOS, yang mana telah diberikan kepada responden keempat. Hakim

Mahkamah Tinggi mendapati bahawa memandangkan LOS telah dikeluarkan kepada responden keempat, responden pertama dan kedua tidak lagi terlibat dan justeru adalah mustahil untuk menangguhkan keputusan-keputusan responden pertama dan kedua. Tambahan, hakim Mahkamah Tinggi juga mendapati bahawa s 29 Akta Prosiding Kerajaan 1956 ('APK') dan s 54 Akta Relief Spesifik 1950 ('ARS') akan mengecualikan sebarang perintah injunktif yang diberikan terhadap responden pertama dan kedua. Mahkamah Tinggi juga menolak permohonan perayu-perayu untuk relief injuktif interim. Perayu-perayu kini membuat rayuan terhadap keputusan tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Keputusan untuk menolak permohonan injunksi/penangguhan adalah pelaksanaan budi bicara bagi pihak mahkamah perbicaraan, yang mana mahkamah rayuan akan teragak-agak untuk campur tangan. Dalam kes ini, permohonan untuk penangguhan keputusan-keputusan kedua-dua responden untuk meluluskan LOS tidak dapat dipertahankan memandangkan LOS telah dikeluarkan kepada responden keempat untuk projeknya di GIA. Adalah fakta yang tidak dapat disangkalkan bahawa responden keempat sekarang merupakan pemegang sah LOS dan adalah mustahil atau praktikal untuk menangguhkan keputusan tersebut. Selanjutnya, perayu-perayu dengan menarik diri untuk meneruskan rayuan terhadap keputusan responden kedua untuk memberikan LOS kepada responden keempat, tidak mempunyai locus standi untuk memohon untuk injunksi atau penangguhan terhadap responden pertama dan kedua (lihat perenggan 10).

(2) Atas fakta matrik kes ini, responden-responden ketiga dan keempat seharusnya dijadikan pihak kepada prosiding-prosiding dari mula lagi iaitu sebelum injunksi diperolehi. Walau bagaimanapun, responden ketiga dan keempat tidak dinamakan atau dijadikan pihak kepada prosiding-prosiding semakan kehakiman atau permohonan untuk penangguhan. Sebaliknya responden ketiga dan keempat telah memfailkan permohonan untuk campur tangan untuk dinamakan sebagai pihak. Sebagai akibat dengan memberikan penangguhan, operasi responden akan terjejas dengan serius, kegagalan di pihak perayu-perayu untuk memasukkan responden ketiga dan keempat dari mulanya memudaratkan permohonan mereka (lihat perenggan 11).

(3) Imbangan ekuiti harus dipertimbangkan bukan sahaja antara perayu-perayu dan responden pertama dan kedua, tetapi juga berkenaan dengan hak-hak dan kepentingan responden ketiga dan keempat, yang telah melaburkan jumlah wang yang besar untuk operasi mereka di GIA. Adalah undang-undang tetap bahawa pemohon bagi injunksi interlokutori seharusnya memberikan akujanji bernilai untuk membayar ganti rugi dan juga sumber-sumber untuk memenuhi akujanji tersebut.

Walau bagaimanapun, perayu-perayu sebagai individu-individu persendirian tidak menunjukkan bukti kedudukan kewangan untuk menunjukkan kebenaran akujanji kosong tersebut (lihat perenggan 11).

(4) Dalam sebarang kes, adalah undang-undang tetap bahawa injunksi, interlokutori atau tetap, tidak dapat diberikan terhadap kerajaan di bawah s 29 APK dan s 54 ARS. Sekiranya relief yang dipohon diberikan, ia akan campur tangan dengan kewajipan awam defendan kedua di bawah Akta dan oleh demikian, s 29 APK melindungi responden kedua, seorang pegawai awam, daripada sebarang bentuk perintah injunksi (lihat perenggan 14 & 16).

(5) Dalam keadaan-keadaan tersebut, keputusan hakim Mahkamah Tinggi untuk menolak permohonan perayu-perayu adalah wajar dalam undang-undang dan fakta. Perayu-perayu telah gagal untuk menunjukkan sebarang alasan yang mewajarkan campur tangan rayuan. Responden pertama dan kedua telah diawardkan kos berjumlah RM10,000 dan responden ketiga dan keempat juga diawardkan jumlah yang sama sebagai kos (lihat perenggan 17–18).]

Notes

For cases on application for, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 3336–3371.

For cases on interlocutory injuction, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 3766–3925.

Cases referred to

Belize Alliance of Conservation Non-Governmental Organisation v Department of Environment (Practice Note) [2003] 1 WLR 2839, PC (refd)

Bursa Malaysia Securities Bhd v Gan Boon Aun [2009] 4 MLJ 695, CA (refd)

Godfrey Philips (M) Sdn Bhd v Timbalan Ketua Pengarah Kesihatan (Kesihatan Awam), Kementerian Kesihatan, Malaysia [2011] 9 CLJ 670, HC (refd)

Hadmor Productions Ltd v Hamilton [1983] 1 AC 191, HL (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (folld)

Lian Keow Sdn Bhd & Anor v Overseas Credit Finance (M) Bhd & Ors [1982] 2 MLJ 162; [1982] CLJ (Rep) 182, FC (refd)

Lim Kit Siang v United Engineers (M) Bhd [1987] CLJ (Rep) 170, SC (refd)

Mukundan a/l Maniam & Ors v Ratiga a/p Markandan & Ors [2011] 5 MLJ 98, CA (refd)

R v Inspectorate of Pollution, ex p Greenpeace Ltd [1994] 1 WLR 570, CA (refd)

Superintendant of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd [2009] 5 MLJ 607; [2009] 6 CLJ 751, CA (refd)

Tien Ik Sdn Bhd & Ors v Kuok Khoon Hwong Peter [1992] 2 MLJ 689, SC (refd)

Tsoi Ping Kwan v Loh Lai Ngoh & Anor [1997] 3 MLJ 165, CA (refd)

A *Zaidin Abd Ghani v Raja Raman Nair & Ors* [2001] 6 CLJ 558, HC (refd)

Legislation referred to

Atomic Energy Licensing Act 1984 ss 32, 32(5)
Companies Act 1965
B Environmental Quality Act 1974
Government Proceedings Act 1956 s 29
Rules of Court 2012 O 53 rr 2(3), 3(5)
Rules of the High Court 1980 O 53 r 3(5)
Specific Relief Act 1950 s 54

C

Appeal from: Judicial Review No 25NCVC-17–7 of 2012 (High Court, Kuantan)

Bastian Vendargon (Hon Kai Ping, R Sarengapani, Anne Vendargon and Gene Vendargon with him) (Bastian Vendargon) for the appellants.
D *Shamsul Bolhasan Khalid (Nurul Farhana Khalid with him) (Senior Federal Counsel, Attorney General's Chambers) for the first and second respondents.*
Cecil Abraham (Wong Kah Hui, Sunil Abrahim, Idza Haidar Idzam and Emily Chin with him) (Jeff Leong) for the third and fourth respondents.

E **Azahar Mohamed JCA (delivering judgment of the court):**

[1] This was an appeal by the appellants (the applicants in the High Court) against the decision of the learned judge of the Kuantan High Court given on
F 8 November 2012 dismissing the appellants' application (encl 13) dated 14 September 2012 for an interim stay until the final disposal of the pending judicial review proceedings. We heard the appeal on 19 December 2012, wherein at its conclusion we unanimously dismissed it with costs. We now give our reasons for so deciding. For convenience, we will refer to the parties in this
G judgment to the title assigned to them in the court below.

[2] To make the point under discussion easier to understand, we think it is useful to state briefly the factual background and the sequence of events leading to the present appeal. The applicants are residents of the town of Kuantan, Kg
H Sungai Ular, Damansara Kuantan Township, and/or are registered proprietors of landed properties in the areas in the District of Kuantan and Gebeng, Pahang. The first respondent is the Minister of Science, Technology and Innovation and is responsible and empowered over the provisions of the Atomic Energy Licensing Act 1984 ('AELA') and the rules and guidelines made
I pursuant to the said Act. The second respondent is the Atomic Energy Licensing Board empowered under the AELA to set the safety level to be complied under any projects or activities that use radioactive materials and/or produce radioactive waste or residue. The third respondent, Lynas Corp Ltd is a listed company under the Australian Securities Exchange incorporated in

Australia. The fourth respondent, Lynas (M) Sdn Bhd, which was incorporated in Malaysia under the Companies Act 1965, is a fully owned subsidiary of the third respondent.

[3] One of the responsibilities of the second respondent is to scrutinise and approve applications for licenses for a project by the fourth respondent's rare earth processing plant referred to as Lynas Advanced Materials Plant ('LAMP') in Gebeng Industrial Area ('GIA') Kuantan, Pahang. The main material utilised by LAMP is the rare earth called 'lanthanide' concentrate which is obtained from lanthanide deposit mining operations from a mine in Mount Weld, Australia. These materials are used in the manufacture of modern equipments and devices such as disk drives, catalytic converter, mobile phones, and flat screen display. The fourth respondent has obtained approval of the mining license to produce 'rare earth oxides and carbonates' in the GIA on 22 January 2008. The approval was given subject to conditions, especially to fulfill the various provisions in the AELA and the Environmental Quality Act 1974.

[4] On 30 January 2012, a temporary operating license ('TOL') was approved by the second respondent to the fourth respondent. After that, on 7 February 2012, the applicants together with three other individuals had filed a notice of appeal to the first respondent pursuant to s 32 of the AELA against the decision of the second respondent made on 30 January 2012. However, in a letter dated 27 March 2012, the applicants withdrew from proceeding with the appeal leaving the remaining individuals to proceed with the said appeal. On 13 June 2012, the first respondent had dismissed the appeal. Then, the applicants had on 14 July 2012 filed the judicial review proceedings (thereafter leave to commence judicial proceedings was granted on 28 August 2012) seeking the following reliefs:

(a) to apply for an order of certiorari for the purpose of quashing the decision of the first respondent made on the 13 June 2012 disallowing the appeal of Ismail bin Abu Bakar, Abujavalli a/p V Raman and Tan Ah Meng with the imposition of two additional conditions thus affirming the decision of the second respondent made on the 30 January 2012 granting TOL to the fourth respondent subject to five conditions for the operation of LAMP in Gebeng, Kuantan;

(b) to apply for an order of prohibition prohibiting the first respondent from issuing any temporary or permanent license to the fourth respondent unless and until:

(i) the fourth respondent submits a detailed environmental impact assessment ('DEIA') report to the second respondent and subject to the approval of the DEIA by the director general of the department of environment ('DOE');

A (ii) the fourth respondent submits a fresh radiological impact assessment (RIA) report to the second respondent for its approval; and

(iii) the four respondent submits a fresh safety case for radioactive waste disposal ('SCRWD') and radioactive waste management plan ('RWMP') proposals to the second respondent for its approval made pursuant to the recommendations of the international atomic energy agency ('IAEA') report dated 30 June 2011.

C (c) that the said TOL be stayed, pursuant to O 53 r 3(5) of the Rules of the High Court 1980 and/or under the inherent jurisdiction of this court, pending the determination of these proceedings;

(d) a declaration that the first respondent had exhibited a real likelihood of bias in favour of the LAMP project, and therefore ought not to have adjudicated on any appeal against the decision of the second respondent to grant the TOL to the LAMP project pursuant to s 32 of the AELA; and

(e) a declaration that the first respondent had acted in excess of jurisdiction, and therefore the ouster clause in s 32(5) of the AELA is of no effect.

[5] On 3 September 2012, the second respondent issued the TOL to the fourth respondent. Not long after that, on 14 September 2012, the applicants filed an application (encl 13), which is the subject matter of the appeal herein, against the first and second respondents seeking for an order that:

F (a) the decisions of the second and first respondents made on 30 January 2012 and 13 June 2012 respectively in relation to the approval of the TOL for the LAMP in Gebeng be forthwith stayed until the final disposal of these judicial review proceedings;

G (b) that the exercise of the rights under the TOL issued on or about 3 September 2012 pursuant to the decisions of the second and first respondents made on the 30 January 2012 and 13 June 2012 respectively, be forthwith stayed till final disposal of these judicial review proceedings; and

H (c) alternatively, an interlocutory injunction be granted restraining the second respondent from issuing any further licenses, permits, or approvals in relation to, and following upon its decision made on 30 January 2012 to approve a TOL to the fourth respondent in respect of its LAMP at Gebeng till final disposal of these judicial review proceedings, upon the undertaking of the applicants to abide by any order of damages that may be made by the court in case the court should hereafter be of opinion that the second respondent shall have sustained by reason of this order, which the applicants ought to pay.

[6] An interim stay was initially granted by the High Court pending the inter parte hearing of the applicants' injunction/stay application on 10 October 2012. The applicants' application was heard on 10 October 2012 and a decision was delivered on 8 November 2012. As we have indicated earlier, the applicants' application was dismissed by the High Court on 8 November 2012. The applicants being dissatisfied with the decision of the High Court has now appealed to the Court of Appeal.

[7] In considering this appeal, we have closely scrutinised the judgment of the learned High Court judge. In her judgment, the learned judge, among others, held that since the TOL has been issued to the fourth respondent, the first and second respondents are no longer involved and hence it was impossible to stay the decisions of the first and second respondents and even then s 29 of the Government Proceedings Act 1956 ('GPA') and s 54 of the Specific Relief Act 1950 ('SPA') need to be considered so as to preclude any injunctive order or otherwise being granted. The learned judge also considered what is the correct test for a stay application premised on the factual matrix of the present case and having considered the decision in *R v Inspectorate of Pollution, ex p Greenpeace Ltd* [1994] 1 WLR 570, decided that it would only be proper if the third and fourth respondents were made parties at the very outset before an injunction was sought. The learned judge then decided that the third and fourth respondents should have been made a party to the judicial review proceedings at the outset.

[8] It is an established principle of law that that it is only in limited and narrow circumstances that an appellate court will interfere with the exercise of discretion on the part of the trial judge in granting or otherwise an application for interim injunctive relief. The function of the appellate court is not to substitute its exercise of discretion for that of the High Court but merely one of review. The decision to refuse the application for an injunction/stay is an exercise of discretion on the part of the trial court. An appellate court should be slow to interfere in an exercise of discretion (see *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191, *Lian Keow Sdn Bhd & Anor v Overseas Credit Finance (M) Bhd & Ors* [1982] 2 MLJ 162; [1982] CLJ (Rep) 182, *Tien Ik Sdn Bhd & Ors v Kuok Khoon Hwong Peter* [1992] 2 MLJ 689, *Tsoi Ping Kwan v Loh Lai Ngoh & Anor* [1997] 3 MLJ 165 and *R v Inspectorate of Pollution, ex p Greenpeace Ltd* [1994] 1 WLR 570).

[9] It is also settled law that the granting of leave for an application for judicial review does not in itself serve an automatic stay of the order and/or decision the judicial review proceedings are seeking to quash and/or impugn and/or set aside (see O 53 r 3(5) of the Rules of Court 2012). Now, the principle which need to be taken into consideration before the granting of a stay in judicial review proceedings is similar to the granting of an application

for interlocutory injunction (see *Bursa Malaysia Securities Bhd v Gan Boon Aun* [2009] 4 MLJ 695 and *Godfrey Philips (M) Sdn Bhd v Timbalan Ketua Pengarah Kesihatan (Kesihatan Awam), Kementerian Kesihatan, Malaysia* [2011] 9 CLJ 670).

[10] That being the principles to be applied, we now turn to consider the specific issues which arise for determination in this appeal. In the injunction/stay application, the first relief sought by the applicants is to stay the decisions of the first and second respondents. It was argued by learned counsel for the appellants that there were special circumstances to grant an interim stay as prayed on the basis that the status quo ought to be maintained, and not altered, till the appeal is disposed off. It was further argued that the judicial proceedings seek, inter alia, to quash the respective decisions of the first and second respondents, which if successful, would result in there being no decisions at all. We do not agree with these arguments. In our judgment, the application to stay the decisions of the two respondents approving the TOL is unsustainable as the TOL had since been issued to the fourth respondent for the LAMP project. Whatever rights, duties and responsibilities accruing under the TOL are now the responsibilities of the fourth respondent. The position would have been different if the TOL had not been issued. The undisputed fact is that the fourth respondent is now the legal and valid holder of the TOL. Viewed in this way, it is not possible or practical for the decision to be stayed. Furthermore, as we have mentioned earlier, in a letter dated 27 March 2012 the applicants withdrew from proceeding with the appeal before the first respondent under s 32 of the AELA. Hence, in our view, there is merit in the arguments that the appellants are not in any position to complain about the first respondent's decision, and therefore they had no locus standi to apply for an injunction/stay application against the first and second respondents (see *Mukundan a/l Maniam & Ors v Ratiga a/p Markandan & Ors* [2011] 5 MLJ 98).

[11] This leads on to the second relief sought by the applicants in the injunction/stay application. That is, the exercise of the rights under the TOL to be stayed forthwith. In this regard it was argued by learned counsel for the appellants that if the fourth respondent starts operations the judicial proceedings could be nugatory as the damage that could result may be irreparable, and irreversible. It is important to bear in mind that the applicants sought to restrain the issuance of the TOL and the exercise of the rights under the TOL which had been given to the fourth respondent. In this regard, relying on the case of *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193, it is the argument of learned counsel for the third and fourth respondents that there are really no serious issues to be tried in the context of the applicants' injunction/stay application. We find there is much force in this argument. The significant point here is that it cannot be disputed

that the rights under the TOL can only be exercised by the fourth respondent. The exercise of the rights under the TOL has passed to the fourth respondent, not the second respondent anymore. The relief sought by the applicants would legally and commercially affect the third and fourth respondents directly as the fourth respondent is the holder of the TOL. At this point, we should highlight an important fact. It is this. At all material times the third and fourth respondents were not named or made parties to the judicial review proceedings and more than that were not parties to the stay application in the High Court. For this, it is all the more striking that the third and fourth respondents had to file an application to intervene to be added as parties. In this respect, the case of *R v Inspectorate of Pollution, ex p Greenpeace Ltd,* which was alluded to by the learned High Court judge in her judgment, discussed the issue of stay and injunctions where similarly, an affected party, was not made a party to the proceedings. In much the same way, in the present case, as the outcome of granting the stay will be to effect detrimentally the operations of the fourth respondent, we take the view that the failure on the part of the applicants at the material time to include the third and fourth respondents from the very outset in the injunction/stay application is fatal to their applications. Hence, in our judgment there are really no serious issues to be tried in the context of the appellants' injunction/stay application. Moreover, the balance of equity must not be weighed as between the appellants and the first and second respondents only, but must be ascertained with regards to the rights and interests of the third and fourth respondents as well, having invested large sums of money for its operations. The third and fourth respondents have invested a sum of around RM1.7 billion as at 21 March 2012 in the LAMP Project. In light of the huge investments by the third and fourth respondents, it is imperative that the appellants make an undertaking to damages and financial loss to be suffered by the fourth respondent, and not merely undertaking as to damages, if any, to be suffered by the first and second respondents. It is trite law that an applicant for interlocutory injunction must provide valuable undertaking to pay damages and further the applicant must show that he has means to fulfill the said undertaking (see *Zaidin Abd Ghani v Raja Raman Nair & Ors* [2001] 6 CLJ 558 and *Belize Alliance of Conservation Non-Governmental Organisation v Department of Environment (Practice Note)* [2003] 1 WLR 2839 and *R v Inspectorate of Pollution, ex p Greenpeace Ltd*). In our judgment, the appellants as private individuals have not shown proof of their financial standing to make good their bare undertaking, given under para 9 of the appellant's affidavit in support of the injunction/stay application.

[12] We turn now to the third alternative relief sought by the applicants in the injunction/stay application, which is an interlocutory injunction to restrain the second respondent from issuing any further licenses, permits, or approvals in relation to, and following upon its decision made on 30 January 2012 to approve a TOL to the fourth respondent in relation to the LAMP project. It is the contention of the learned senior federal counsel for the first and second

respondents that the application by the applicants for an interlocutory injunction is misconceived by virtue of the provisions of s 29 of the GPA and s 54 of the SPA. We find this argument persuasive.

[13] In the first place, we are of the view that in judicial review proceedings an application for an injunction can only be made pursuant to O 53 r 2(3) of the Rules of Court 2012, which provides as follows:

> (3) Upon the hearing of an application for judicial review, the court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any court orders, including an order of injunction or monetary compensation.

Hence, we are of the view that an application for an injunction could only be made at the substantive judicial review hearing and not before it.

[14] But that is not all. An injunction, interim/interlocutory or permanent cannot be granted against the government under s 29 of the GPA and under s 54 of the SPA. The authority to support this proposition can be found in the decision of our then Supreme Court in *Lim Kit Siang v United Engineers (M) Bhd* [1987] CLJ (Rep) 170 (SC). In particular, the relevant passage from the judgment states:

> This means that no injunction could be directly or indirectly issued against the government or its officers. Similarly, the court has no jurisdiction to grant an injunction against a private litigant if the injunction would have the effect of 'restraining the Government or its officers from performing their functions. This has been the interpretation which has been placed by the courts in England as well as in this country.

[15] The principle of law enunciated above has been reaffirmed by the Court of Appeal in, *Superintendant of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd* [2009] 5 MLJ 607; [2009] 6 CLJ 751.

[16] It follows from this, after giving due considerations to the submissions of all parties, if the relief sought for is granted, this will interfere with the public duty of the second respondent under the AELA and as such, s 29 of the GPA protects the second respondent, being a public authority, from any form of injunctive orders.

[17] For all the reasons stated, we are of the view that the learned judge had exercised her discretion correctly in dismissing the applicants' injunction/stay application. The decision of the learned judge in dismissing the application was correct in law and fact. All considered, in our judgment, the learned judge was

justified in so deciding. With respect, the applicants have failed to show any valid grounds warranting our interference in the exercising of the learned judge's discretion.

[18] In the result, we had unanimously dismissed this appeal with costs in the sum of RM10,000 to the first and second respondents. We also awarded the same amount as costs to the third and fourth respondents.

[19] Deposits refunded to the appellants.

Appeal dismissed with costs.

Reported by Kohila Nesan